

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE J. BOLENBAUGH, III,

Defendant-Appellant.

UNPUBLISHED

September 11, 2003

No. 240335

Muskegon Circuit Court

LC No. 00-045234-FH

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct¹ involving two different victims and was sentenced to concurrent prison terms of seventy-one months to fifteen years for one conviction and eighty-six months to fifteen years for the other conviction. Defendant appeals as of right, arguing that the trial court erred by refusing to sever the two charges and by refusing to admit evidence that one of the victims had herpes. We affirm.

I

When offenses are related, a trial court may generally sever the related offenses, but is not required to do so.² This is especially true where the allegedly prejudicial evidence would have been admissible in the separate trials.³ Here, we find no abuse of discretion in the trial court's decision not to sever the charges because the charges in this case arose out of a continuous series of events occurring in one evening, in the same places, with the same witnesses, and showed a pattern of behavior on the part of defendant. The testimony of both complainants was necessary to adequately present the events of the evening, and most of each complainant's independent testimony would have been admissible as eyewitness testimony at separate trials for each charge.

¹ MCL 750.520d(1)(a) (sexual penetration of a person at least thirteen years of age and under sixteen years of age).

² MCR 6.120(C); *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

³ *Id.*

II

Defendant sought to introduce evidence that one of the complainants had herpes, arguing that her active case of herpes was relevant to a possible motive for accusing defendant of criminal sexual conduct. He contended that the evidence was relevant to the complainant's bias and credibility. We agree with the trial court that the evidence was irrelevant and that, even if relevant, any probative value of the evidence was substantially outweighed by the risks of unfair prejudice.⁴

III

In a supplemental brief, defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to interview certain witnesses before trial and to call certain witnesses during trial, failed to introduce evidence that would have created reasonable doubt, and failed to introduce evidence showing that the complainant accused defendant of giving her herpes. We disagree.

This issue is not preserved for appellate review because defendant failed to move for a new trial or a Ginther⁵ hearing before the trial court.⁶ An unpreserved constitutional error warrants reversal only when it is a plain error affecting a defendant's substantial rights.⁷ Because defendant failed to raise this issue before the trial court, our review is limited to errors apparent from the existing record.⁸

In order to establish ineffective assistance of counsel, a defendant must demonstrate (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.⁹ A reasonable probability is a probability sufficient to undermine confidence in the outcome.¹⁰ Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.¹¹

⁴ See MRE 403; see also *People v Johnson*, 245 Mich App 243, 260-261; 631 NW2d 1 (2001).

⁵ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

⁶ *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

⁷ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁸ *Snider*, *supra*.

⁹ *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

¹⁰ *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

¹¹ *People v. Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The details of the allegations of error are not apparent from the lower court record and thus, these errors are forfeited.¹² In so concluding, we note that whether to call witnesses at trial is a matter of trial strategy.¹³ With regard to the argument regarding evidence that the complainant had herpes, we note defense counsel attempted to introduce this evidence and the trial court concluded that the evidence was not relevant.

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

¹² *Snider, supra*.

¹³ *Rockey, supra* at 76.